Ideal Advantage Sdn Bhd v Palm Spring Joint Management Body & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S-22–58 OF 2009
ASMABI MOHAMAD JC
16 AUGUST 2013

Civil Procedure — Injunction — Application for — Collection of rentals for accessory car park parcels from tenants of condominium — Notification of establishment of Joint Management Body ('JMB') — Application and/or injunction restraining JMB from collecting rentals on car park parcels — Whether car park parcels were common property — Whether injunction restraining collection of rentals should be allowed — Building and Common Properties (Maintenance and Management) Act 2007

The first defendant was the joint management body ('JMB') of the Palm Spring @ Damansara Condominium ('the condominium'). The plaintiff had collected rentals in respect of 439 units of accessory car park parcels ('the car park parcels') from the tenants of the condominium who were mostly residents. However, on 20 December 2008, the first defendant notified the plaintiff of its establishment pursuant to the Building and Common Properties (Maintenance and Management) Act 2007. In the present action, the plaintiff sought for a declaration and/or injunction to restrain the first defendant and its agent, the second defendant, from collecting rentals on the car park parcels. The defendants refuted the plaintiff's claim and alleged that out of the 439 accessory car park parcels assigned to the 45 units of condominiums purchased by the plaintiff in the condominium which were registered under the plaintiff's name and owned by the plaintiff, 213 of the car park parcels were visitors' car parks which were common property ought to have been registered under the first defendant's name. By way of a counterclaim, the first defendant claimed from the plaintiff 213 accessory car park parcels out of the 439 accessory car park parcels which were registered under the plaintiff's name and/or owned by the plaintiff.

Held, dismissing the claim with costs and allowing the counterclaim:

(1) The plaintiff had failed to prove its case against the defendants on the standard required by the law which was on the balance of probabilities. On the totality of evidence, the first defendant had proved its counterclaim on the balance of probabilities (see paras 3–4).

(2) The 213 accessory car park parcels were common property and the first

defendant was entitled to collect rentals and be entitled to all income derived there from. The sale of 394 of accessory car park parcels assigned to 40 Units of condominiums was void and unenforceable. The Registrar of Titles of Selangor was ordered to cancel the registration of the 394 accessory car park parcels (see paras 4(a)–(b) & (d)).

(3) The plaintiff was entitled to only one accessory car park parcel assigned to each unit purchased by the plaintiff. The 213 accessory car park parcels which were assigned to the units purchased by the plaintiff were meant for visitors' car parks and were common property within the context of the Strata Titles Act 1985 (see para 4(c)).

(4) The plaintiff was restrained by itself or its directors, employees and/or representatives to interfere with the maintenance and collection of rentals or other income from the 213 accessory car park parcels (see para 4(e)).

(5) The accounts in respect of the 213 accessory parcels up to 20 December 2008 and all rentals collected by the plaintiff were to be paid to the first defendant. The rentals collected by the plaintiff in respect of other accessory parcels which were assigned to the 40 Units of condominium purchased by the plaintiff were to be returned to the tenants and/or occupants of the condominiums who rented these accessory car park parcels from the plaintiff (see para 4(f)).

[Bahasa Malaysia summary

Defendan pertama adalah badan pengurusan bersama ('BPB') Palm Spring @ Damansara Condominium ('pangsapuri'). Plaintif telah mengutip sewa berkaitan 439 unit bahagian tempat letak kereta tambahan ('bahagian tempat letak kereta') daripada penyewa pangsapuri yang kesemuanya adalah penghuni. Walau bagaimanapun, pada 20 Disember 2008, defendan pertama memberitahu plaintif mengenai penubuhannya berikutan Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007. Dalam tindakan ini, plaintif memohon untuk perisytiharan dan/atau injunksi untuk menghalang defendan pertama dan ejennya, defendan kedua, daripada mengutip sewa bahagian tempat letak kereta. Defendan-defendan menyangkal tuntutan plaintif dan mendakwa bahawa dari 439 bahagian tempat letak kereta tambahan yang diserahhak kepada 45 unit pangsapuri yang dibeli oleh plaintif di pangsapuri tersebut yang mana didaftarkan di atas nama plaintif dan dimiliki oleh plaintif, 213 daripada bahagian tempat letak kereta adalah tempat letak kereta pelawat yang mana adalah hartanah umum patut didaftarkan di atas nama defendan pertama. Melalui tuntutan balas, defendan pertama menuntut daripada plaintif 213 bahagian tempat letak kereta tambahan daripada 439 bahagian tempat letak kereta tambahan yang mana didaftarkan di atas nama plaintif dan/atau dimiliki oleh plaintif.

Diputuskan, menolak tuntutan dengan kos dan membenarkan tuntutan balas:

(1) Plaintif gagal untuk membuktikan kesnya terhadap defendan-defendan atas standard yang dikehendaki oleh undang-undang iaitu atas imbangan kebarangkalian. Berdasarkan keseluruhan keterangan, defendan pertama telah membuktikan tuntutan balasnya atas imbangan kebarangkalian (lihat perenggan 3–4).

(2) Bahagian tempat letak kereta tambahan sebanyak 213 tersebut adalah hartanah umum dan defendan pertama berhak untuk mengutip sewa dan berhak kepada kesemua pendapatan yang berbangkit daripadanya. Jualan 394 bahagian tempat letak kereta tambahan yang diserahhakkan kepada 40 unit pangsapuri tersebut adalah terbatal dan tidak boleh dikuatkuasakan. Pendaftar Hak Milik Selangor diminta untuk membatalkan pendaftaran 394 bahagian tempat letak kereta tambahan tersebut (lihat perenggan 4(a)–(b) & (d)).

(3) Plaintif berhak kepada satu bahagian tempat letak kereta tambahan yang diserahhakkan kepada setiap unit yang dibeli oleh plaintif. 213 bahagian tempat letak kereta tambahan tersebut yang mana diserahhakan kepada unit-unit yang dibeli oleh plaintif adalah untuk tempat letak kereta pelawat dan adalah hartanah umum dalam Akta Hak Milik Strata 1985 (lihat perenggan 4(c)).

(4) Plaintif dihalang oleh dirinya sendiri atau pengarahnya, pekerjanya dan/atau wakil untuk campur tangan dengan penyelenggaraan dan pengutipan sewa atau pendapatan lain daripada 213 bahagian tempat letak kereta tambahan tersebut (lihat perenggan 4(e)).

(5) Akaun berkaitan 213 bahagian tambahan sehingga 20 Disember 2008 dan kesemua sewa yang dikutip oleh plaintif dikehendaki dibayar kepada defendan pertama. Sewa yang dikutip oleh plaintif berkaitan bahagian tambahan lain yang mana diserahhakan kepada 40 unit pangsapuri yang dibeli oleh plaintif dikehendaki dipulangkan kepada penyewa dan/atau penghuni pangsapuri yang menyewa bahagian tempat letak kereta tambahan ini daripada plaintif (lihat perenggan 4(f)).]

Notes

For cases on application for injunction, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3336–3371.

Cases referred to

Abraham Aaron Issac v Management Corporation Strata Title Plan No 664 [1999] 3 SLR 81, CA (refd)

BSN Commercial Bank (M) Bhd v Pentadbir Tanah Daerah, Mersing [1997] 5 MLJ 288, HC (refd)

Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd [2006] 4 MLJ 284; [2006] 8 CLJ 69, HC (refd)
Gan Hwa Kian & Anor v Shencourt Sdn Bhd [2007] 4 MLJ 554; [2007] 3 CLJ 538, HC (refd)
Russian Commercial and Industrial Bank v British Bank For Foreign Trade Ltd [1921] 2 AC 438, HL (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)
Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener) [1995] 2 MLJ 421, HC (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 s 2
Contracts Act 1950 ss 24, 24(a), (b), (e)
Evidence Act 1950 ss 101, 106
Land Titles (Strata) Act (Cap 158) [SG] ss 9(5), 30(1)
National Land Code ss 214, 340, 340(1), (2) 340(2)(a), (b), (c), (3), Part 14
Specific Relief Act 1950 s 41
Strata Titles Act 1985 ss 4, 5(1), (2), 34, 34(2), 41, 69
Town and Country Planning Act 1976 s 22(3), (4)

Adrian Oswald a/l Rajendran (Jeff Sia and Muhammad Fauzi (PDK) with him) (Manjit Singh Sachdev) for the plaintiff.
Justin Voon (Johnston Yap and Anson Liang (PDK) with him) (Yap & Co) for the defendant.

Asmabi Mohamad JC:

INTRODUCTION

[1] By its amended writ and amended statement of claim dated 30 August 2010 ('ASOC') the plaintiff had sought from this court a declaration and/or an injunction to restrain the first defendant and its agent, the second defendant from collecting rentals on 439 units of accessory car park parcels in Palm Spring @ Damansara Condominium which address is at No 1, Jalan PJU 3/29, Section 13, Kota Damansara 47810 Petaling Jaya, Selangor ('Palm Spring Condominium').

[2] The first defendant refuted the plaintiff's claim and alleged that out of the 439 accessory car park parcels assigned to the 45 units of condominiums purchased by the plaintiff in the Palm Spring Condominium which are registered in the name of the plaintiff and owned by the plaintiff, 213 of these accessory car park parcels are visitors' car parks which are 'Common Property' which ought to have been registered in the name of the first defendant. Hence

the first defendant by way of a counterclaim, claimed from the plaintiff 213 accessory car park parcels out of the 439 accessory car park parcels which are registered in the name of the plaintiff and/or owned by the plaintiff.

[3] Both the main claim and the counterclaim were heard by me with two witnesses having testified for the plaintiff and six witnesses having testified for the defendants. After having given much consideration to the evidence, documentary as well as testimonial, and the submissions by all learned counsel for the respective parties, I found that the plaintiff had failed to prove its case on the standard required of it based on its pleaded case as stated in its ASOC. Hence, I dismissed the plaintiff's claim with costs.

[4] On the totality of the evidence before me, I am satisfied that the first defendant had established its counterclaim against the plaintiff on the balance of probabilities. Therefore I allowed the first defendant's counterclaim against the plaintiff in the following terms with costs:

(a) that the 213 accessory car park parcels, situated at the ground floor of Palm Spring Condominiums as described in para 29(a) at p 63 and 64 of the plaintiff's Supplementary bundle of pleadings (document marked as 'A2') are 'Common Property' and that the first defendant is entitled to collect rentals and be entitled to all income derived there from;

(b) that in so far as the sale of 394 of accessory car park parcels assigned to 40 units of condominiums by Muafakat Kekal Sdn Bhd ('MKSB') as shown in the strata parcels plan are void and unenforceable;

(c) that the plaintiff is entitled to only one accessory car park parcel assigned to each unit purchased by the plaintiff. The 213 accessory car park parcels which were assigned to the units purchased by the plaintiff were meant for visitors' car parks and are 'common property' within the context of the Strata Titles Act 1985 ('Act 318');

(d) that the Registrar of Titles of Selangor is hereby ordered to cancel the registration of the 394 accessory car park parcels which were assigned to the 40 units purchased by the plaintiff from the strata parcels plan;

(e) an injunction to restrain the plaintiff by itself or its directors, employees and/or representatives to interfere with the maintenance and collection of rentals or other income from the 213 accessory car park parcels; and

(f) for all accounts to be taken in respect of these 213 accessory parcels up to 20 December 2008 and for all rentals collected by the plaintiff to be paid to the first defendant. Those rentals collected by the plaintiff in respect of other accessory parcels which were assigned to the 40 units of

condominiums purchased by the plaintiff to be returned to the tenants and/or occupants of the condominiums who rented these accessory car park parcels from the plaintiff.

[5] The plaintiff being dissatisfied with my decision dated 21 May 2013 to allow the first defendant's counterclaim as per the terms stipulated in para 4 above appealed to the Court of Appeal Malaysia against the whole of the said decision.

THE DOCUMENTS

[6] At the outset of the trial, the parties have agreed for the following documents to be used:

	Description		*Document*
i.	Bundle of Pleadings	-	'A1'
ii.	Supplementary Bundle of Pleadings	-	'A2'
iii.	Supplementary Bundle of Pleadings (2)	-	'A3'
iv.	Common Agreed Bundle of Document (Vol 1–4)	-	'B1-B4'
v.	Plaintiff's Supp Bundle of Document	-	'B5'
vi.	Supp Common Bundle of Document	-	'B6'
vii.	Defendants' Supp Bundle of Document	-	'B7'
viii.	Plaintiffs Supp Bundle of Document (1)	-	'B8'
ix.	Plaintiffs Supp Bundle of Document (2)	-	'B9'
x.	Plaintiff's Supp Bundle of Document (3)	-	'B10'
xi.	Plaintiff's Supp Bundle of Document (4)	-	'B11'
xii.	Bundle of Affidavits	-	'C'
xiii.	Issues To Be Tried (filed by the plaintiff)	-	'D'
xiv.	Issues To Be Tried (filed by the defendants)	-	'E'
xv.	Statements of Agreed Facts	-	'F'
xvi.	Plaintiff's Opening Statement	-	'G'
xvii.	Chart prepared by the defendants	-	'H'
xviii.	Original Sale & Purchase Agreements	-	'I (1)-(45)'

THE ISSUES TO BE TRIED

[7] Both parties had framed separate issues for this court's consideration. The plaintiff's issues are as stated in the document marked as 'D' and the defendants' issues are as stated in the document marked as 'E'. The salient issues are as follows:

In the main Claim

(a) whether the sale of 45 units of condominiums with 439 units of accessory car park parcels attached to these 45 units purchased by the plaintiff contravenes Act 318 and/or was against the spirit and policy of the law and/or public policy;

(b) whether the whole intention of MKSB to sell 439 Units of accessory car park parcels to the plaintiff together with the 45 units of condominiums was for the plaintiff to operate a car park rental business at the Palm Spring Condominium to the third parties/other condominium owners' of Palm Spring Condominium;

(c) whether the plaintiff had rented out 439 Units of these accessory car park parcels to the third parties/occupants' of Palm Spring Condominium separately from the 45 Units/parcels of main condominium which the plaintiff had purchased;

(d) whether the plaintiff had breached the law by dealing with the accessory car park parcels separately from the main parcels;

(e) whether the 439 accessory car park parcels are being used and/or intended to be used by the plaintiff with the intention or for purpose and/or in conjunction with the main parcels;

(f) whether the sale and purchase agreements between the plaintiff and MKSB especially with regards to the sale of 439 accessory car park parcels assigned to only 45 units condominiums which were purchased by the plaintiff were without consideration;

(g) whether the sale and purchase agreements between the plaintiff and MKSB are bona fide agreements and/or bona fide transactions;

(h) whether the sale of 439 accessory car park parcels to the plaintiff by MKSB was in breach of the law and/or the guidelines issued by Petaling Jaya City Council ('*MBPJ*') and whether there were sufficient car parks being allocated for visitors of Palm Spring Condominium;

(i) whether the 439 accessory car park parcels are inclusive of the car parks which ought to have been allocated by the developer as visitors' car parks pursuant to MBPJ Guidelines/ Laws;

(j) whether the 439 accessory car parks parcels are inclusive of the car parks which were meant for the visitors' car parks which are 'Common Property' within the meaning of Act 318;

(k) whether the plaintiff and MKSB are companies which are associated to each other;

(l) whether the plaintiff is entitled to collect rental from any tenant in respect of 439 accessory car park parcels and/or 213 car parks and whether the revenue retained by the plaintiff's solicitor for rentals which had been collected ought to be returned to the tenants who rented these accessory car parks parcels and/or to the first defendant;

(m) whether the second defendant which is the agent of the first defendant ought to have been cited as a party to this proceeding; and

(n) whether the plaintiff is entitled to the prayers sought in its SOC.

In the counterclaim

(a) the first and second defendants adopt all the above issues herein as well as the issues listed below;

(b) whether MKSB had complied with the law and/or the guidelines issued by MBPJ in the allocation of car parks for Palm Spring Condominium;

(c) whether the plaintiff and MKSB and/or the plaintiff had wrongly taken out and/or taken over the parcels which were meant for visitors' car parks and ought to have been assigned as 'Common Property' within the context of Act 318 and sold off these parcels to the plaintiff as accessory parcels assigned to the 41 units of condominium which were purchased by the plaintiff from MKSB;

(d) whether the 41 sale and purchase agreements between MKSB and the plaintiff dated 7 December 2005 are void and unenforceable especially pertaining to the accessory car park parcels; and

(e) whether the relief sought by the first defendant in the counterclaim ought to be granted.

THE AGREED FACTS

[8] The agreed facts which are stated in the document marked as 'F', among others, are as follows:

(a) The first defendant is the joint management body of the Palm Spring Condominium which address is at the first Floor Clubhouse, Palm Spring Condominium, No 1, Jalan PJU 3/29, Section 13, Kota Damansara 47810 Petaling Jaya, Selangor;

(b) MKSB was the registered owner of all the properties held under master title described as PN 26623, No Lot 44938 Pekan Baru Sungai Buloh, Selangor.

(c) The said property was previously known as HS (D) 178135, PT No 5021, Seksyen 13, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor;

(d) The plaintiff had collected rentals in respect of the 439 accessory car park parcels at Palm Spring Condominium from the tenants of the

condominiums until 20 December 2008 and these tenants are mostly residents of Palm Spring Condominium;

(e) On 20 December 2008, the first defendant had issued a 'Notification' dated 20 December 2008; and

(f) The first defendant was established on 5 April 2008 pursuant to the Building and Common Properties (Maintenance and Management) Act 2007.

THE CASE FOR THE PLAINTIFF

[9] The plaintiff in this action had purchased 45 units of condominiums at Palm Spring Condominium together with 439 units of accessory car park parcels and 22 units of store room parcels from MKSB. At the time of the purchase of these 45 units of condominiums, 439 units of accessory parcels meant for car parks and 22 units of store room parcels are comprised in separate individual accessory parcels and attached to the condominium parcels that were purchased by the plaintiff. The 45 units of condominium, 439 units of accessory parcels and 22 store room parcels were all registered in the name of the plaintiff and owned by the plaintiff.

[10] The plaintiff and MKSB had executed 41 sales and purchase agreements in respect of 41 condominiums dated 7 December 2005. The sale and purchase agreements in respect of four other condominiums were executed on 27 June 2006 (see sale and purchase agreements marked as 'I(1) - (45)'). The plaintiff had made full payment for the purchases of these 45 units of the condominiums which payments included the payments for 439 accessory car park parcels and 22 store room parcels. Vacant possession in respect of all these condominiums inclusive of the 439 accessory car park parcels and the 22 store room parcels were delivered by MKSB to the plaintiff on 30 April 2007. These 45 units of condominiums had been granted the strata parcels plan by the Registrar of Land Title for the State of Selangor. The 439 accessory parcels meant for the car parks and the 22 store room parcels had been endorsed as accessory parcels in the said 45 condominiums' strata titles.

[11] After the delivery of the vacant possession of all the 45 units, the 439 accessory car park parcels and the 22 store room parcels on 30 April 2007, the plaintiff proceeded to rent out the 45 units of condominiums to various tenants. The plaintiff had also rented out the 439 accessory car park parcels to its tenants as well as other occupants of the Palm Spring Condominium from the date of vacant possession on 30 April 2007 up to 20 December 2008.

[12] On 20 December 2008, the first defendant had caused a notice to be

issued to all residents of the Palm Spring Condominium notifying these residents that the rentals in respect of all these car parks which were previously paid to the plaintiff must be channelled to the first defendant. By the same notice, the residents were also notified that all renewals of the car park rental too had to be applied to the first defendant. The first defendant had also notified the residents that it no longer recognised the receipts issued by the plaintiff for the car parks rented out by the plaintiff. As a result of this notice having been issued by the first defendant, the tenants and/or residents who were renting the car parks from the plaintiff had refused to pay the plaintiff the rentals for the car parks they rented from the plaintiff. These tenants had, instead, paid the rentals in respect of the 439 car parks to the first defendant for which receipts were issued by the first defendant.

[13] The action of the first defendant to issue the notice to the tenants and/or occupants of the Palm Spring Condominium to restrain them from paying the rentals in respect of the accessory car park parcels to the plaintiff and to proceed with the collection of rentals in respect of the 439 accessory car park parcels from these tenants and residents had caused the plaintiff to suffer pecuniary loss. Further by the said conduct of the first defendant in taking over the car park rental business from the plaintiff, the plaintiff who was the registered owner of these car parks was deprived of the revenue it was entitled to collect in respect of the 439 accessory car parks owned by the plaintiff. The action of the first defendant too had deprived the plaintiff's beneficial rights over the 439 accessory car park parcels which the plaintiff had legally and validly purchased from MKSB. The particulars of the accessory parcels which were assigned to the 45 units were as stated at paras 6, 9 and 11 of the ASOC (see pp 21–23, 24–31 and 32–36 of 'A2').

[14] According to the plaintiff, all the 45 units in Palm Spring Condominium which were initially registered in the name of MKSB had been legally transferred to the plaintiff through the 45 sale and purchase agreements executed between the plaintiff and MKSB. Therefore the plaintiff is legally the registered owner of these condominium units as well as the accessory parcels attached to these units. This is evidenced through the issuance of 39 strata titles in the name of the plaintiff. By the issuance of these strata titles in the name of the plaintiff, the plaintiff are lawfully and legally the owners of the condominium units and all accessory parcels which were attached to these 39 units of condominiums. Therefore these accessory parcels are not 'Common Property' within the meaning of Act 318. The other six units of condominiums which were purchased by the plaintiff together with the accessory parcels were in the process of being transferred to the plaintiff's name. Hence pursuant to s 340(2) of the National Land Code ('NLC'), the plaintiff's titles to the 45 units as well as the accessory parcels are indefeasible.

[15] The 439 accessory car park parcels were not meant to be used by other condominium owners but only by the parcel owners to which the 439 accessory parcels were attached to. That being the case, these accessory parcels are not 'common property' within the meaning of Act 318.

[16] Aggrieved by the action of the first defendant in posting the said notification to notify all residents to stop paying the rentals in respect of the 439 accessory car park parcels owned by the plaintiff to the plaintiff and the action of the first defendant to collect rentals in respect of the 439 accessory car park parcels, the plaintiff by its ASOC filed herein prayed for:

(a) a declaration that the plaintiff has absolute rights to collect and/or to take rental on the 439 accessory car park parcels in Palm Spring Condominium, which were purchased by the plaintiff from MKSB;

(b) an injunction to restrain the defendants from advertising and/or posting any notices, which has the effect and/or to induce the tenants, who were renting 439 of the accessory car park parcels in Palm Spring Condominium, which were purchased by the plaintiff to pay rental for the said 439 accessory car park parcels to the defendants;

(c) an injunction to restraint the defendants from collecting and/or taking the rental on 439 accessory car park parcels in Palm Spring Condominium, which were purchased by the plaintiff;

(d) that the defendants to pay the plaintiff damages to be assessed by the Senior Assistant Registrar of the High 14 Court on the rental collections made by the defendants from the tenants of 439 accessory car park parcels in Palm Spring Condominium, which were purchased by the plaintiff from 20 December 2008 until the date of judgment; and

(e) costs of the action.

[17] On 2 June 2010 the Court of Appeal had granted an interim injunction in favour of the plaintiff to restrain the defendants from collecting rental on 439 accessory car park parcels pending the disposal of this action by this court.

THE CASE FOR THE DEFENDANT

[18] MKSB was the registered owner of the master title known as PN 26623, No Lot 44938, Pekan Baru Sungai Buloh, Selangor ('the land') which had developed the Palm Spring Condominium. The development order in respect of the said land dated 9 October 2003, inter alia, (see 'B-6') provided that:

(a) the development shall comprise of six blocks (1–6) with a total of 2180 residential units;

(b) the number of car parks to be provided for these residential units were 2449;

(c) each unit of the condominium must be allocated with one accessory car park parcel. 10% of these accessory car park parcels must be allocated for visitors' car parks;

(d) the development of Palm Spring Condominium would require 2180 car parks with one car park for each unit and with 10% of 2180 car parks to be allocated as visitors' car parks.

[19] MKSB sold 45 units of condominium to the plaintiff vide sales and purchase agreements dated 7 December 2005 and 27 June 2005 respectively and together with these 45 units of condominium, a total of 439 accessory car park parcels were attached to these 45 units and given for free to the plaintiff. In respect of the 45 units of condominium that were purchased by the plaintiff, only five units of condominium were allocated with one accessory car park parcel for each unit but the rest of the condominiums had been allocated between eight to 15 accessory car park parcels attached to each unit of condominium (see 'B2' at pp 506–1318).

[20] Each accessory car park parcel was sold for about RM20,000 to the purchasers who were interested to buy these parcels. However the 439 accessory car park parcels which were registered in the name of the plaintiff were given for free to the plaintiff. The cost of between eight to 15 accessory car park parcels which were attached to a unit of condominium would be within the range of RM160,000 (RM20,000 / car park x 8 units) to RM300,000 (RM20,000/ per car park x 15 units) respectively. In short the plaintiff had only paid for the cost of the condominiums and along with those condominiums a total of 439 accessory car park parcels were transferred and registered in the name of the plaintiff.

[21] This arrangement was made possible because of the special and close relationship between the plaintiff and MKSB. Both the plaintiff and MKSB share the same registered address, same office and one of the plaintiff's directors, one Mr Lee Yek Hui was the shareholder of MKSB (see B7 at p 101) and the director of the plaintiff. Mr Lee Yek Hui is also the elder brother of Miss Lee Bee Kee (PW1), who is the managing director of the plaintiff. All these facts were admitted by PW1 during cross-examination (see pp 34–35 of the notes of proceedings).

[22] The vacant possession of the condominium units and the accessory car park parcels were delivered to the plaintiff even before the plaintiff paid the full purchase price to MKSB (see pp 30, 32–33 of the notes of proceedings). This was obviously in contravention of cl 5 of the sale and purchase agreement

which provided that vacant possession shall be delivered only upon payment of the balance purchase price. This, according to the first defendant, was clear examples of the hush-hush manner in which the 439 accessory parcels had been unlawfully transferred to the plaintiff.

[23] Further, the provision of cl 6 of the sale and purchase agreement provides that in event of default on the part of the plaintiff as purchaser to pay the balance purchase price on the completion date would result in the termination of the sale and purchase agreements. However in respect of the dealings between the plaintiff and MKSB, this term of the agreement had not been adhered to. The provision of cl 19 which provides that time is of essence for the respective parties to fulfil their obligations pursuant the agreement too had not been adhered to by both parties. All these facts taken together proved that there was a special and close relationship between the plaintiff and MKSB.

[24] After vacant possession of the 45 units of the condominiums and the 439 accessory car park parcels and 22 units of store room parcels had been obtained by the plaintiff, the plaintiff proceeded to operate a car park rental business at the said Palm Spring Condominium whereby the 439 accessory car park parcels registered in its name were opened for rent to the tenants and/or residents of Palm Spring Condominium other than those who were occupying these 45 units of Condominium at the rate of RM120 per month per car park. This had resulted in an acute shortage of car parks for the residents as well as the visitors of the Palm Spring Condominium. Most of these residents had no choice but to rent the car parks from the plaintiff at the monthly rental of RM120 per month.

[25] This acute shortage of car park ought not to have happened if the developer had complied with the development order by allocating one car park to every condominium unit in Palm Spring Condominium instead of transferring 439 accessory parcels to the plaintiff for the plaintiff to operate a car park rental business. In order to resolve the acute problem faced by the residents of Palm Spring Condominium, a meeting was convened on 23 March 2006 which was chaired by YB Dato' Hj Mohd Mokhtar bin Hj Ahmad Dahlan. In the said meeting it was resolved that 239 uncovered car parks at the 'perimeter' of Palm Spring Condominium were to be marked and allocated as visitors' car parks. As a follow up to that meeting, a letter was sent by MPPJ to MKSB which was signed by the director of MPPJ (see 'B4' at p 1617) for MKSB to give effect to what was decided in the said meeting. However, MKSB opted to ignore the said letter.

[26] The first defendant alleged that out of the 239 'perimeter' uncovered car parks which had been identified during the meeting held on 23 March 2006 to be marked as visitors' car parks, 213 of these car parks as stated in paras 22 and

29(a) of the amended defence and counterclaim had been identified as part of the 439 car parks assigned to the 45 units of condominium which were sold to the plaintiff. The first defendant alleged that the plaintiff is not legally entitled to these 239 car parks which ought to have formed and/or be identified as 'common property' as envisaged by Act 318. The first defendant claimed that in respect to 239 car parks, the first defendant was entitled to collect rentals.

[27] Except for five units of condominiums which were allocated with one accessory car park parcel each, the rest of the condominium units were allocated between 8–15 accessory parcels for each unit. The plaintiff had only paid for the price of the condominiums. It did not matter what the price of the condominium was, the number of car parks allocated to one unit of condominium was either one unit or between 8–15 units per one unit of condominium. The evidence of the witnesses (see evidence of Koay Boon Hooi ('DW1') Susan Chin Swee Lee ('DW3') and the chairman of the first defendant ('DW5')) disclosed that each accessory parcel was sold for about RM20,000 to the purchasers who were interested to buy these accessory parcels.

[28] The first defendant claimed that the plaintiff had no right to claim ownership over the 439 accessory car park parcels as the plaintiff had breached the provision of ss 4, 34 and 69 of Act 318, in that, the accessory parcels which were transferred by MKSB to the plaintiff were not meant to be used in conjunction with the main parcels but the acquisition of the 439 accessory parcels by the plaintiff was for a predominant purpose for the plaintiff to operate a car park rental business at Palm Spring Condominium to generate profit. It is obvious that these 439 accessory car parks were not meant to be used in conjunction with the main parcel but were meant to be rented out separately and/or independently of the main parcels. This obviously had contravened the provisions of ss 4, 34(2) and 69 of Act 318. Therefore the first defendant alleged that the transfer of these 439 accessory parcels to the plaintiff is illegal and void and should be set aside.

[29] The defendants contended that there was clear breach of the development order dated 9 October 2003 which stipulated that, the developer MKSB was supposed to allocate one car park each for one condominium unit and another 10% of the total number of car parks allocated to the residential units totalling 2180 were supposed to be allocated for visitors' car parks. The particulars pertaining to the number of residential units to be constructed pursuant to the development order was 2180 and 10% of 2180 units of Condominium would be 218 car parks for visitors' car parks. This fact was confirmed by Puan Sharipah Marhaini Syed AN ('DW4') during the trial (see pp 83 and 84 of the notes of proceedings). DW4 had also confirmed that the development order was made pursuant to the Town and Country Planning Act

1976. Therefore, the development order is part of the law. The development order in respect of Palm Spring Condominium dated 9 October 2003 had stipulated that a certain number of car parks must be provided for the said development. Hence it is part of the requirement of the law that the number of the car parks as stated in the development order ought to have been provided by the developer, failing which the developer had committed a breach of the development order.

[30] In the case of this development it would appear, on paper, the number of car parks as stated in the development order had been provided by the developer. However the actual physical allocation of the car parks as stipulated in the development order which was one car park for one condominium unit and 218 car parks (10% of 2180) for the whole of Palm Spring Condominium to be allocated for visitors' car parks had not been complied with by MKSB. MKSB had instead decided to allocate a total of 439 car parks inclusive of the 213 visitors' car parks which were meant for individual condominium units and visitors' of the Palm Spring Condominium to the plaintiff for the plaintiff to operate a car park rental business within the Palm Spring Condominium. The 10% of 2180 car parks which MKSB was supposed to allocate for visitors' car park pursuant to the development order too was attached as accessory parcels to the 45 units of condominiums purchased by the plaintiff. In fact in respect of the said Palm Spring Condominium development there was no visitors' car park allocated. The developer had clearly and blatantly violated the conditions stipulated in the development order. It was admitted by the plaintiff's two witnesses (PW1 and PW2) that Palm Spring Condominium was facing acute shortage of visitors' car parks.

[31] The defendants alleged that the sale and purchase of 439 accessory parcels together with the 45 units of condominiums is illegal and had offended the Town and Country Planning Act 1976 and Act 318. The minimum car park requirement as stipulated in the conditions to the development order in respect of the Palm Spring Condominium had not been complied with by MKSB. There was blatant disregard to the requirement and conditions of the development order. instead of allocating one unit of accessory parcel to a condominium unit, MKSB transferred the 439 accessory parcels to the plaintiff for the plaintiff to operate a car park rental business at the Palm Spring Condominium.

[32] The claim by the plaintiff to the 'ownership' of the 439 accessory parcels is illegal and in breach of Act 318. If the relevant provisions of Act 318 were to be examined, it is obvious that it is not the intention and purpose of the said Act 318 for the accessory car park parcels to be transferred in bulk in the manner that was done in this case. Act 318 envisaged that the accessory parcels which are shown in the strata plan must be used or intended to be used in

conjunction with the main parcels. Further s 34(2) of Act 318 states that the accessory parcel shall not be dealt with or disposed off independently of the parcel to which such accessory parcel has been made appurtenant. Section 69 of Act 318 provides that the accessory parcel or any share or interests therein shall not be dealt with independently of the parcel to which such accessory parcel has been made appurtenant as shown on the approved strata plan.

[33] According to the defendants from the reading of the above sections of Act 318 as discussed in the preceding paragraph, it is apparent that the dealings and/or the disposal of the 439 accessory parcels independently or separately from the main parcels are prohibited by Act 318. PW1 had testified that the purpose the plaintiff to acquire 439 accessory parcels was to enable the plaintiff to operate a car park rental business at the said Palm Spring Condominium. Therefore the intention for a substantial number of accessory parcels acquired by the plaintiff was not to be used and/or intended to be used in conjunction with the 45 units of condominiums the plaintiff had purchased but to deal with the said accessory parcels independently and separately by renting out these accessory parcels to persons other than those occupying or renting the 45 condominiums. PW1 had admitted on oath that at the outset, the purpose of the acquisition of these 439 accessory parcels was to operate a car park rental business in Palm Spring Condominium (see pp 11, 12, 48, 44-45 notes of proceedings).

[34] The defendants further alleged that each of the condominium unit which the plaintiff purchased is about 1000 sqft. Therefore it is not justified for a unit with approximately 1000 sqft to own between eight to 15 accessory parcels. The most it needed is only one or two. Hence it is obvious that the rest of the accessory parcels which are attached to the said unit were to be used separately from the main parcels and/or to be rented to other residents who were not tenants of the 45 condominium units belonging to the plaintiff. The plaintiff had every intention at the outset to 'using', 'intending to use' and 'dealing' with the accessory parcels 'separately' or 'independently' from the main parcels.

[35] The word used in ss 34(2) and 69 of Act 318 is 'dealt' would include the act of 'renting out' or 'tenanting out'. Therefore the plaintiff in this case is prohibited by Act 318 to rent out the accessory parcel separately or independently from the main parcel. This interpretation is also in harmony with the interpretation and reading of the words in s 4 of Act 318 which defines 'accessory parcel' to mean 'an accessory parcel which is 'used' or 'intended to be used in conjunction with' a parcel'. The words used and/or intended to be used would also include the renting out of the accessory parcel separately from the main parcels to other residents but not for the use or intended use of the tenant and/or occupant of the main parcels. The 'harmonious interpretation' of the

various provisions highlighted above would show that the renting out of the accessory parcels by the plaintiff contravenes of Act 318.

[36] In view of the above interpretation of the various provisions of Act 318 as well as the Town and Country Planning Act 1976, it is illegal for the plaintiff to own such a substantial number of accessory car park parcels with the aim of operating a car park rental business at Palm Spring Condominium. The transfer of 213 accessory parcels which were attached to 40 units of condominiums which were purchased by the plaintiff had resulted in the acute shortage of car parks faced by the residents and visitors of Palm Spring Condominium. This transfer too had resulted in MKSB in not adhering to the Conditions imposed by the development order dated 9 October 2003 in respect of the development of Palm Spring Condominium.

[37] The defendants claimed that there was clear breach and non compliance of the law which would render the transfer of the accessory parcels as was done in this case unlawful and illegal. The action of the developer to transfer these accessory parcels would render the whole purpose and intent of an 'accessory parcel' intended by Act 318 obviated and circumvented. Further, both the developer and the plaintiff had abused the law to serve their own commercial purpose for profit. Due to the illegality and/or void contract, the transfer of any of the 439 accessory car park parcels to the plaintiff by MKSB is unlawful. Hence any registration of these accessory parcels in the name of the plaintiff is no longer indefeasible and ought to be set aside. The plaintiff cannot be the owner of these accessory parcels in breach of the law. Notwithstanding the breach committed by MKSB in complying with the development order and the fact there was blatant disregard to the mandatory conditions stipulated in the development order by MKSB and as MBPJ (formerly known MPPJ) did not do anything to act against the errant developer. Hence, the defendants had no choice but to resort to this court for remedy.

[38] With regard to the claim filed by the plaintiff against the second defendant, the first defendant claimed that the second defendant was wrongly cited as a defendant in this case. The second defendant herein is merely the agent of the first defendant and therefore it ought not to have been cited as a defendant in this action.

[39] By its counterclaim, the first defendant prayed for:

(a) a declaration that the 239 visitors' car park including 213 units of car parks situated at the Ground Floor of Palm Spring Condominium the particulars of which are as set out in paragraph 29 (a) of the counterclaim

held under PN 26623 Pekan Baru Sungai Buloh, are 'common property' and that the first defendant are entitled to all rentals and income from these car parks;

(b) a declaration that 41 sales and purchase agreements entered into between the plaintiff and MKSB dated 7 December 2005 in relation to the said accessory car park parcels are void and unenforceable;

(c) an order for the Registrar of Titles of the State of Selangor to cancel the endorsement on these accessory parcels from the related strata titles plan and strata titles instruments;

(d) a permanent injunction to restrain and/or prohibit the plaintiff by itself or its directors, employees or representatives to take actions to interfere with the maintenance and collection of rental or any other income from the said accessory car park parcels;

(e) for the taking of account up to 20 December 2008 for all rentals or income collected by the plaintiff for these accessory car park parcels;

(f) for judgement to be entered in respect of the amount stated under item (e) above; and

(g) costs and other relief this court deems fit.

THE FINDINGS AND EVALUATION

Burden of proof

[40] The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950 ('the Act'). Pursuant to s 101 of the Act, the legal burden of establishing the facts pleaded against the defendants is on the plaintiff. At the conclusion of the case, this court has a duty to determine whether sufficient evidence has been adduced by the plaintiff to prove his case on the balance of probabilities and/or beyond reasonable doubt, depending on what is appropriate and applicable to the plaintiff's pleaded case.

[41] Pursuant to s 106 of the Evidence Act 1950, the burden to prove any fact which is especially within the knowledge of the plaintiff lies on the plaintiff.

[42] With this principle in mind I would now evaluate the plaintiff's evidence as well as the evidence of the defendants in the counterclaim in order

to ascertain if the plaintiff in the main claim and the defendants in their counterclaim had met with the standard of proof envisaged by the law in respect of their respective claims.

The findings

[43] The plaintiff had pleaded that all the 45 units of condominium and 461 accessory parcels had been acquired by the plaintiff through the sales and purchase agreements entered into between the plaintiff and MKSB dated 7 December 2005 and 27 June 2005 respectively. These parcels both, main and accessory had been transferred and registered in the name of the plaintiff. However it was disclosed during the trial that only 39 of the main parcels and 439 accessory parcels had been transferred in the name of the plaintiff and issued with strata titles (see Q & A 375 & 376 of WS-PW1) and not 45 as pleaded. Six more condominium units and the accessory parcels attached to these units are in the process of being registered under Act 318 in the name of the plaintiff.

[44] The evidence adduced during the trial showed that when MKSB sold 45 units of condominium to the plaintiff vide the sales and purchase agreements dated 7 December 2005 and 27 June 2005 respectively, a total of 439 accessory car parcels were attached to these 45 units and sold together to the plaintiff. It was also a fact that out of the 45 units that were sold to the plaintiff only five units of condominiums were allocated with one accessory car park parcel for each unit. The rest of the units had either between eight to 15 accessory car park parcels attached to each unit of condominium (see 'B2' at pp 506–1318). Most of the units that the plaintiff purchased were within the range of RM100 to RM110 per sqft. It was also in evidence that the accessory car park parcels were sold for about RM20,000 per parcel to the residents of the Palm Spring Condominium who were interested to buy these accessory car park parcels. Except for five units of condominium which were allocated with one accessory car park parcel each, the remaining condominium units which were purchased by the plaintiff were allocated between eight to 15 accessory car park parcels for each unit of condominium. It is also a fact that the cost of these eight to 15 accessory parcels allocated to the plaintiff would be within the range of RM160,000 to RM300,000 which is definitely more expensive than the price of a single unit of condominium purchased by the plaintiff.

[45] PW1 had admitted in her testimony that most of the units that the plaintiff purchased from MKSB were within the range of RM100 to RM110 per sqft and the plaintiff was only required to pay for the price of the condominium units. With the purchase of these condominium units, between eight to 15 accessory car park parcels were allocated to the plaintiff for each condominium unit the plaintiff purchased from MKSB. According to the

plaintiff, this arrangement was possible as the plaintiff had purchased the condominium units in bulk. When quizzed by learned counsel for the defendants during cross examination, PW1 admitted that the price of eight to 15 accessory car park parcels allocated to each unit of condominium purchased by the plaintiff would be between RM160,000 to RM300,000. PW1 had also admitted that these accessory car parks were in fact given to the plaintiff for free. It was also in evidence that the cost of eight to15 accessory car park parcels allocated to each unit of condominium purchased by the plaintiff was more expensive than the price of a single unit of condominium the plaintiff paid to MKSB. PW1 had also testified that the whole purpose the plaintiff bought a substantial number of accessory car park parcels together with the condominium units was to run a car park rental business at Palm Spring Condominium. The targeted tenants of these accessory car park parcels were the tenants and/or residents of Palm Spring Condominium.

[46] Since the subject matter of this case concerns Act 318, the relevant provisions of the Act 318 and Town and Country Planning Act 1976 will would have to be examined in order to ascertain if the acquisition of the 439 accessory car park parcels by the plaintiff in the manner that it was done in this case was in accordance with the provision of Act 318 and other or in accordance with related laws.

Reconciliation of ss 4, 34(2) and 69 of Act 318

[47] The salient provisions of Act 318 would have to be reconciled in order to ascertain the true intent and purpose of the Act. These provisions are as follows:

(a) Section 4 of Act 318 states:

> 'accessory parcel' means any parcel shown in a strata plan as an accessory parcel which is used or intended to be used in conjunction with a parcel' (emphasis added)

(b) Section 34(2) of Act 318 states:

> 'No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant.' (emphasis added)

(c) Section 69 of Act 318 provides as follows:

> 'No accessory parcel or any share or interests therein shall be dealt with independently of the parcel to which such accessory parcel has been made appurtenant as shown on the approved strata plan.'(emphasis added)

[48] From the reading of the above provisions of Act 318, it would appear that for the purpose of Act 318, the accessory car park parcels which are attached to the respective condominium units and/or main parcels shall only be used or intended to be used together with the main parcels and these accessory car park parcels shall not be dealt with 'independently' or 'separately' from the main parcels.

[49] One has to look at the plain, simple and ordinary meaning of the salient words in the relevant provisions of Act 318, quoted above in order to understand the true intent and spirit of law.

(a) The word accessory had been defined by *Concise Oxford English Dictionary* (11th Ed) to mean:

> 'a thing which can be added to something else in order to make it more useful, versatile, or attractive'.

(b) The *New Shorter Oxford English Dictionary*, Vol 1A–M, edited by Lesley Brown defines 'accessory' to mean:

> 'An additional or subordinate thing; an adjunct, an accompaniment;'

(Note: From the clear definition of the words 'accessory parcel' given by s 4 of Act 318, it is obvious that Act 318 envisages that the accessory car park parcel which is shown in the strata plan as an accessory parcel attached to the main parcel must be used or intended to be used in conjunction with the said main parcel to which it is attached to or appurtenant to.)

(c) The *Concise Oxford English Dictionary* (11th Ed), edited by Catherine Soanes and Angus Stevenson defines the word conjunction to mean an instance of two or more events occurring at the same point in time or space and the words in conjunction was defined to mean together. Hence the phrase in conjunction with the main parcel used in the said definition section illustrate that the accessory car park parcel assigned to the condominium units purchased by the plaintiff, in this case the 439 parcels car park parcels must mean that these accessory car park parcels must be used concurrently or at the same time or together with the use of the 45 units of condominiums purchased by the plaintiff.

(d) The word *appurtenant* used in the sections that I have quoted above had been defined by *Black's Law Dictionary* (7th Ed) by Bryan A. Garner to mean *Annexed to a more important thing and appurtenance* means *Something that belongs or is attached to something else (the garden is an appurtenance to the land).*

(e) *Stroud's Judicial Dictionary of Words and Phrases* (6th Ed), Vol 1: A-F states that *appurtenantmeans annexed to or inseparably connected with.*

(f) *The Dictionary of English Law* by Earl Jowitt by Sweet & Maxwell describes *Appendant and appurtenant* as *These words are used to describe a hereditament which is annexed to another hereditament, the latter hereditament being the principal hereditament and the hereditament which is annexed thereto being the adjunct or accessory.*

(g) Jowitt went to say Once a thing appendant has been separated from the principal so as to be held in gross, or independantly, it can never become appendant again'.

(h) *Appurtenant* had also been defined by Jowitt to mean…. *pertaining or belonging to*'

[50] From the above definitions of the words used in s 4 of Act 318, an accessory parcel is a parcel that is annexed, attached, connected, dependant on and/or used or intended to be used with the main parcel. The word *accessory* means a thing that can be added to something else in order to make it more useful, versatile or attractive. It also means an attachment, addition, added-on, adjunct, appendage and appurtenance.

[51] The Court of Appeal of Singapore had the opportunity to deal with the meaning of the words 'accessory lot' which are found in ss 9(5) and 30(1) of the Singapore Land Titles (Strata) Act (Cap 158) in *Abraham Aaron Issac v Management Corporation Strata Title Plan No 664* [1999] 3 SLR 81 at p 88. The said court held that an accessory lot has to be used in conjunction with the lot to which it is attached to or appurtenant. The court states as follows:

> An accessory lot as its name connotes, does not exist on its own and cannot be dealt with independently of the lot to which it is appurtenant.

[52] This argument is further strengthened by the words stipulated in s 34(2) of Act 318 which state that no rights in an accessory parcel shall be dealt with or disposed of independently of the main parcel. I am of the view that the word dealt with is wide enough to encompass the act of renting of the said accessory car park parcel to tenants who are not occupants of the 45 condominium units owned by the plaintiff as was done in this case.

[53] Having evaluated the evidence of the plaintiff's witnesses especially PW1, I am satisfied that at the outset the purpose of the plaintiff to acquire 439 accessory car park parcels together with the 45 condominium units was to commence a car park rental business in Palm Spring Condominium. PW1 had admitted that even a condominium unit which the plaintiff purchased from MKSB with one bedroom and one study room and with only 1000 sqft, it was allocated with thirteen accessory car park parcels (see p 12 of the notes of proceedings). During cross-examination by learned counsel for the defendants,

PW1 admitted that the extra accessory car park parcels were to be rented to different people who occupy Palm Spring Condominium including those residents who occupy condominium units other than the 40 units owned by the plaintiff. The receipts which were produced in the court further strengthened the fact that these accessory car park parcels were meant for rental at RM120 per month to the residents of the Palm Spring Condominium other than the tenants of the plaintiff ('D-2', 'D-3' and 'D-6'). Despite being evasive in her answers pertaining to the substantial amount of rentals collected by the plaintiff, PW1 could not suppress the information that a substantial amount of rentals had been collected by the plaintiff from these accessory car park parcels. In the course of the trial, this court was informed that a substantial sum of rentals collected by the plaintiff was placed in the custody of the plaintiff's solicitor as a stakeholder pending the disposal of this action. Both PW1 and PW2 had also admitted that there were not sufficient car parks for the residents and visitors of Palm Spring Condominium.

[54] From the evidence that was adduced during the four day trial it could not be disputed that the whole purpose for the plaintiff to acquire the 439 accessory car park parcels together with 45 units of condominium was to run a car park business at Palm Spring Condominium. It was also not disputed that for each of the condominium unit which is about 1000 sqft at most would require one or two car parks. Obviously the remaining car parks attached to that particular unit were meant for the plaintiff's car parks rental business. The same explanation would apply to the rest of the condominium units purchased by the plaintiff. It is obvious that these accessory car park parcels were used separately from the main parcel. The renting of these accessory car park parcels to persons other that the tenant of the specific unit and/or the renting of the accessory car park parcels in itself amount to 'using', 'intending to use', and 'dealing' with the accessory parcel 'separately' or 'independently' from the main parcel.

[55] It is also in evidence that each of the condominium unit which the plaintiff purchased is about 1000 sqft. Therefore it is not justified for the plaintiff to own between eight to15 accessory parcels for such a small unit. The most it needed is only one or at most two. Hence it is obvious that the rest of the accessory car park parcels which are attached to the said unit were to be used separately from the main parcel and/or as testified by PW1 to be rented to other residents who are not tenants of the 45 condominium units owned by the plaintiff. The plaintiff had every intention at the outset to 'using', 'intending to use' and 'dealing' with the accessory parcels 'separately' or 'independently' from the main parcels. Hence the plaintiff's action to rent out these accessory car park parcels separately or independently from the main parcel is not to use the said accessory car park parcels in conjunction with the main parcels as envisaged by Act 318.

[56] The Hansard of the Parliamentary debates in the Senate during the tabling of Act 318 on 22 April 1985 (see Tag 26 of 'SD (F)-2') further strengthen and support the contention that the accessory car park parcels must be used and/or intended to be used in conjunction with the main parcels to which these accessory car park parcels are attached, annexed and/or appended to. The language of the Hansard were in the following words:

> *Petak Aksesori adalah istilah yang digunakan bagi petak-petak yang digunakan bersama-sama dengan petak yang didiami tetapi terletak di luar petak berkenaan ataupun di luar dari bangunan berkenaan, seperti tempat letak kereta.*

[57] The word 'dealt' used in ss 34(2) and 69 of Act 318 would include the act of 'renting out' or 'tenanting out' of these accessory car park parcels. Therefore the plaintiff in this case is prohibited by Act 318 to rent out the accessory car park parcels separately or independently from the main parcels. This interpretation is also in harmony with the reading of the words in Section 4 of Act 318 which defines 'accessory parcel' to mean 'an accessory parcel which is used or intended to be used in conjunction with a parcel'. The words used and/or intended to be used would also include the renting out of the accessory car park parcels separately from the main parcels to other residents but not for the use or intended use of the tenants and/or occupants of the main parcels. The 'harmonious interpretation' of the various provisions highlighted above would show that the renting out of the accessory car park parcels by the plaintiff as was done in this case was in contravention of Act 318 as the plaintiff is prohibited by Act 318 to deal with the accessory parcels separately or independently from the main parcel.

Breach of development order

[58] The claim of 'ownership' of the 439 accessory parcels by the plaintiff is illegal and in breach of Act 318. If the relevant provisions of Act 318 were to be examined, it is obvious that it was not the intent and purpose of the said Act 318 for the accessory parcels to be transferred in bulk in the manner that was done in this case. These 439 accessory parcels were attached to the 45 units of condominiums and/or main parcels purchased by the plaintiff from MKSB. It would appear that the sale of these accessory parcels would contravene the Town and Country Planning Act 1976. As the developer, MKSB had breached the conditions of the development order and Act 318.

[59] The purpose of the sale and purchase of the 439 units of accessory car park parcels not only defeated the intent and spirit of Act 318 but also the Town and Country Planning Act 1976. MKSB had breached the condition of the development order dated 9 October 2003 made under ss 22(3) and 22(4) of the Town and Country Planning Act 1976. Thus the 10% of the 2180 car

parks that MKSB had to provide was part of the conditions of the development order applicable to Palm Spring Condominium which MKSB must comply with. By dealing with the car parks which were meant for visitors' car parks and/or which were meant to be 'common property' as defined in s 2 of the Building and Common Property (Maintenance and Management) Act 2007, MKSB had breached the mandatory conditions stipulated in the development order dated 9 October 2003.

Breach of s 24 of the Contracts Act 1950

[60] The 45 sales and purchase agreements entered into between the plaintiff and MKSB had contravened s 24 of the Contracts Act 1950 as the consideration and object of these Agreements is unlawful. Section 24 of the Contracts Act 1950 provides:

> Section 24 What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful, unless —
>
> (a) It is forbidden by a law;
>
> (b) It is of such a nature that, if permitted, it would defeat any law;
>
> (c) It is fraudulent;
>
> (d) It involves or implies injury to the person or property of another; or
>
> (e) The court regards it as immoral, or opposed to public policy.

[61] Based on the reasons that I had discussed in the preceding paragraphs, I am of the view that the sale of the 439 accessory car park parcels by MKSB to the plaintiff together with the 45 units of condominium with the object for these accessory car parks to be rented out to persons other than the tenants of the 45 units of condominium is therefore void and unenforceable.

[62] In view of the above interpretation of the various sections of Act 318 as well as the spirit and intent of the Town and Country Planning Act 1976, it is illegal for the plaintiff to own such a substantial number of accessory car park parcels with the aim of operating a car park rental business at Palm Spring Condominium. The transfer of 213 accessory car park parcels which were attached to 40 units of condominiums which were purchased by the plaintiff had resulted in the acute shortage of car parks faced by the residents and visitors of Palm Spring Condominium. This transfer too had resulted in MKSB in not complying with the mandatory conditions imposed by the development order

dated 9 October 2003.

Issue of defeasibility of title

[63] My next point relates to the applicability of the provisions of the NLC to the parcels which are registered under Act 318. The law places a very high standard on the defendant to discharge the burden of dislodging the indefeasibility of title of the registered proprietor. It requires a clear unequivocal evidence to discharge the high standard of proof to dislodge the indefeasible title of the plaintiff.

[64] Section 5(1) of Act 318 provides that the provisions of Act 318 shall be construed and be read together with the provisions of the NLC. Section 5(2) further provides that the provisions of the NLC and the rules made there under shall be applicable to the parcels registered under Act 318 so long as these provisions are not inconsistent with the provision of Act 318 or are capable of applying to the parcels.

[65] The relevant provision of the NLC which relates to the issue of defeasibility of title is s 340. Section 340(1) provides that the registration of the title or interest under the NLC (in our case the registration of the accessory car park parcels under Act 318) in the name of the plaintiff shall be indefeasible and could not be challenged unless if it be shown that the title was obtained under the circumstances illustrated in s 340(2)(a), (b) and (c). Section 340(3) further provides that where the title or interest of any person is defeasible under any of the illustrations mentioned under s 340(2), such title could be set aside. However the proviso to s 340 protects the interest of bona fide purchaser for valuable consideration.

[66] On the totality of evidence before me, the details of which are as illustrated above and with the clear admission by PW1 especially during cross examination pertaining to the purpose of the transfer of the accessory car park parcels the plaintiff, I am satisfied that the defendant had discharged the high burden placed on them by the law.

[67] I have attempted to illustrate in the earlier portion of my judgment that the transfer and registration of the 394 accessory car park parcels in the name of the plaintiff is unlawful and had offended Act 318, the Town and Country Planning Act 1976 and ss 24(a), (b) and (e) of the Contracts Act 1950. Therefore the plaintiff had unlawfully acquired such titles from MKSB and/or such titles had been obtained by the plaintiff by means of insufficient or void instrument. From the factual matrix of the case before me, the plaintiff too had not shown to this court that the accessory titles were obtained in good faith and for valuable consideration to qualify the benefit under the proviso to s 340 of

the NLC. In view of this, I am of the view that the titles obtained by the plaintiff in respect of the accessory car park parcels are not indefeasible. Hence the transfer of these accessory car park parcels from MKSB to the plaintiff is void.

Whether the plaintiff is entitled to declaratory relief

[68] The plaintiff in this case is seeking for declaratory relief which is discretionary in nature. The substantive law which confers the jurisdiction on the plaintiff to seek the remedy in the form of a declaratory relief is s 41 of the Specific Relief Act 1950. From the wordings of s 41 of the Specific Relief Act 1950, the relief is discretionary in nature (See the case of *Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554; [2007] 3 CLJ 538). The court jurisdiction to make declaratory relief is unlimited, subject only to its own jurisdiction (*Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 MLJ 421; *BSN Commercial Bank (M) Bhd v Pentadbir Tanah Daerah, Mersing* [1997] 5 MLJ 288; *Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd* [2006] 4 MLJ 284; [2006] 8 CLJ 69; *Russian Commercial and Industrial Bank v British Bank For Foreign Trade Ltd* [1921] 2 AC 438, at p 448; *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812).

[69] From the facts of this case, it is apparent that the 439 accessory car park parcels were deliberately transferred by MKSB to the plaintiff. In the course of that, the mandatory conditions set out in the development order in respect of Palm Spring Condominium had been violated. There was also clear defiance of the provision of Act 318, the Town and Country Planning Act 1976 and the Contracts Act 1950. At the outset, both MKSB and the plaintiff knew and had full knowledge that the 439 accessory car park parcels were not to be used for the purpose of the 40 units of condominium the plaintiff purchased from MKSB but for a predominant purpose of commercial use by the plaintiff for its own enrichment. This was clearly admitted by PW1 that these accessory car park parcels were not meant only for the use of the tenants who occupied the plaintiff's condominium units but the use of the Palm Spring Condominium's resident at large and/or residents who are not occupants or tenants of the plaintiff's condominium units.

[70] There was in fact clear intention of the plaintiff and MKSB to defy the provision of Act 318. Under Part 14 of the NLC, such a transfer could be effected by s 214 of the NLC but subject to prohibition or limitation imposed by the NLC or any written law (in this case Act 318) which prohibit the use of accessory car park parcels other than for the use of or intended use in conjunction with a parcel.

[71] In order to succeed in a claim for a relief in the form of a declaration, the text book entitled declaratory orders by PW Young had outlined six conditions to be satisfied as follows:

(a) the proceeding must involve a right;

(b) must be brought by a person who has a proper and tangible interest in obtaining the order;

(c) the controversy must be subject to the court's jurisdiction;

(d) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility;

(e) the question must be real and not theoretical question; and

(f) the person raising it must have real interest to oppose the declaration sought.

[72] Hence in view of the above reasoning, the plaintiff in this case had not satisfied condition (b) listed above to justify this court to grant the declaratory relief sought by it.

ANSWERS TO THE ISSUES POSED

In the main claim

(a) whether the sale of 45 units of condominiums with 439 units of accessory car park parcels attached to these 45 units purchased by the plaintiff contravenes Act 318 and/or was against the spirit and policy of the law and/or public policy;
Answer: Yes

(b) whether the whole intention of MKSB to sell 439 units of accessory car park parcels to the plaintiff together with the 45 units of condominiums was for the plaintiff to operate a car park rental business at the Palm Spring Condominium to the third parties/other condominium owners' of Palm Spring Condominium;
Answer: Yes

(c) whether the plaintiff had rented out 439 units of these accessory car park parcels to the third parties/occupants' of Palm Spring Condominium separately from the 45 units/parcels of main condominium which the plaintiff had purchased;
Answer: Yes

(d) whether the plaintiff had breached the law by dealing with the accessory car park parcels separately from the main parcels;
Answer: Yes

(e) whether the 439 accessory car park parcels are being used and/or intended to be used by the plaintiff with the intention or for purpose and/or in conjunction with the main parcels;
Answer: No

(f) whether the sale and purchase agreements between the plaintiff and MKSB especially with regards to the sale of 439 accessory car park parcels assigned to only 45 units condominiums which were purchased by the plaintiff were without consideration;
Answer: Yes

(g) whether the sale and purchase agreements between the plaintiff and MKSB are bona fide agreements and/or bona fide transactions;
Answer: No

(h) whether the sale of 439 accessory car park parcels to the plaintiff by MKSB was in breach of the law and/or the guidelines issued by Petaling Jaya City Council ('MBPJ') and whether there were sufficient car parks being allocated for visitors of Palm Spring Condominium;
Answer: Yes and no

(i) whether the 439 accessory car park parcels are inclusive of the car parks which ought to have been allocated by the developer as visitors' car parks pursuant to MBPJ guidelines/ laws;
Answer: Yes

(j) whether the 439 accessory car parks parcels are inclusive of the car parks which were meant for the visitors' car parks which are 'common property' within the meaning of Act 318;
Answer: Yes

(k) whether the plaintiff and MKSB are companies which are associated to each other;
Answer: Yes

(l) whether the plaintiff is entitled to collect rental from any tenant in respect of 439 accessory car park parcels and/or 213 car parks and whether the revenue retained by the plaintiffs solicitor for rentals which had been collected ought to be returned to the tenants who rented these accessory car parks parcels and/or to the first defendant;
Answer: No, revenue to be returned to the tenants who rented these accessory car parks and defendant wherever appropriation

(m) whether the second defendant which is the agent of the first defendant ought to have been cited as a party to this proceeding;
Answer: No

(n) whether the plaintiff is entitled to the prayers sought in its SOC.
Answer: No

In the counterclaim

(a) —

(b) whether MKSB had complied with the law and/or the guidelines issued by MBPJ in the allocation of car parks for Palm Spring Condominium;
Answer: No

(c) whether the plaintiff and MKSB and/or the plaintiff had wrongly taken out and/or taken over the parcels which were meant for visitors' car parks and ought to have been assigned as 'common property' within the context of Act 318 and sold off these parcels to the plaintiff as accessory parcels assigned to the 40 units of condominium which were purchased by the plaintiff from MKSB;
Answer: Yes

(d) whether the 40 sale and purchase agreements between MKSB and the plaintiff dated 7 December 2005 are void and unenforceable especially pertaining to the accessory car park parcels;
Answer: Yes

(e) whether the relief sought by the first defendant in the counterclaim ought to be granted.
Answer: Yes, in the terms as ordered by this court.

THE CONCLUSION

[73] Based on the foregoing, I am satisfied that the plaintiff had failed to prove its case against the defendants on the standard required by the law which is on the balance of probabilities. In view of the above, I dismissed the plaintiff case with costs. On the totality of evidence before me, I am satisfied that the first defendant had proved its counterclaim on the balance of probabilities. I therefore allowed the defendant's counterclaim in the wordings as stated in para 14 above. After a short submission on costs I granted costs, in favour of the defendants in the sum of RM80,000.

[74] Lastly, I would like to express my sincere appreciation to both learned counsels who had diligently and professionally conducted the trial before me and assisted me with their well researched submissions to enable me to resolve this case.

[75] This was in fact an intricate and complex case which I had to deal with, given the fact that the Registrar of Titles of Selangor had not been cited as a party to the action and the MPPJ's blatant disregard to the law and its enforcement power to initiate action against the errant developer despite

having full knowledge of the non-compliance of the conditions of the development order dated 9 October 2003 by the developer. From the evidence before me, each unit in MPPJ was pushing the blame to the other. The court was left with no choice but to try to resolve the case in the best manner it could with the public policy element in mind.

[76] I wish to state here that I had faced a lot of difficulties in trying to resolve the issue pertaining to the rentals collected from the tenants, whether by the plaintiff or the defendant who were residents of the condominium units purchased by the plaintiff. The order that I made herein especially with regard to how the collection of rentals were to be redistributed and/or refunded by either the plaintiff and the defendant, which ran into millions of Ringgit Malaysia, is a delicate matter and ought to be handled by the respective parties with care. This was the best that I could reconcile and hence the order.

Claim dismissed with costs and counterclaim allowed.

Reported by Afiq Mohamad Noor